

ACOSTA (Migration) [2019] AATA 464 (8 February 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mrs HEIDI SAGULO ACOSTA
CASE NUMBER:	1715207
DIBP REFERENCE(S):	CLF2013/36657
MEMBER:	James Lambie
DATE:	8 February 2019
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221 of Schedule 2 to the Regulations

STATEMENT MADE ON 08 FEBRUARY 2019 AT 12:09PM

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing relationship – insufficient evidence before the delegate – consistent credible evidence before the Tribunal – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cl 801.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 July 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 20 February 2013 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because there was insufficient evidence of a genuine and continuing relationship.
5. The applicant appeared before the Tribunal on 31 July 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Peter Harry Louis Hoyer, who is the applicant's Partner, and from Daniel Hoyer, Raymond Hoyer and Susan Hoyer.
6. The applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether Ms Acosta and Mr Hoyer are in a genuine spousal relationship.

Whether the parties are in a spouse or de facto relationship

9. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

11. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties produced a Queensland marriage certificate attesting to their marriage on 23 February 2018. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2) (a).

Are the other requirements for a spouse relationship met?

12. The parties claim to have met online in about 2011. Mr Hoyer travelled to the Philippines in September 2012 for three weeks, during which time he met Ms Acosta's family and started making arrangements for her to join him in Australia. She arrived in Australia in December 2012 and they commenced their de facto relationship immediately. The parties obtained a Queensland registered relationship certificate on 3 February 2013 and, as noted above, married on 23 February 2018. They share a residence at Upper Coomera with Mr Hoyer's son Daniel, who is a university student.

13. Financial aspects of the relationship

14. In assessing the financial aspects of the relationship, I have had regard to the joint ownership of assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed by the parties inter se and the sharing of day-to-day household expenses.
15. Mr Hoyer is a qualified electrician, now retired. He is a pensioner and works approximately 12 hours per week at the Dreamworld amusement park. Ms Acosta is employed as a cleaner at Star Casino and works approximately 30 hours per week. On account of her income, Mr Hoyer collects only a part pension, a matter to which I give some weight.
16. The couple's residence is owned by Mr Hoyer, subject to a mortgage to the Commonwealth Bank. There is a very small balance outstanding on the loan. This is Mr Hoyer's second marriage and he has an adult son. The couple produced his will dated 19 February 2018, in which it is contemplated that Ms Acosta will share the house and its associated expenses with Daniel until she dies or remarries, at which time the property will revert to Daniel. This appears to be an orthodox arrangement, given the family commitments in such circumstances. I do not accord it significant weight either way in relation to the joint ownership of assets. The parties each own a motor vehicle in their own names, registered to the same residential address. I note the parties' home and contents and car insurance are in joint names. I give this some weight in their favour.
17. In their submissions to the delegate in 2016, the parties produced only a narrow range of bank statements covering one month in 2013. It is unsurprising that this material was considered unsatisfactory as indicative of a genuine spousal relationship. Before the Tribunal, the parties produced copies of Ms Acosta's Commonwealth Bank Complete Access account statements for the period 18 July 2015 to 17 April 2017 and 1 March to 29 June 2018, Mr Hoyer's Complete Access statements for 17 March to 16 June 2018, Mr Hoyer's home loan statements for 2015 to 2017 and a number of insurance and household utility statements. The parties gave evidence, separately and consistently, that Mr Hoyer pays the utilities, automotive expenses and other major bills and that Ms Acosta pays for groceries and incidental household expenses. That evidence is supported by the bank statements and I give it weight.
18. On the basis of the material presented and the evidence of the parties, I am satisfied that the financial aspects of the relationship are indicative of a genuine relationship.

19. *The nature of the household*

20. In assessing the nature of the household, I have had regard to the any joint responsibility for the care and support of children, the parties' living arrangements and any sharing of housework.
21. It is artificial to consider the assistance given to Daniel in terms of joint responsibility for the care and support of children, given his age and independence. It is, however, clear that he is very much part of the household, and that Ms Acosta provides a measure of support by funding the groceries and incidental expenses and including him in social activities. Daniel's evidence was that, since 2012, he has warmed to her considerably as he has seen the depth of her relationship with his father and witnessed the contribution she makes to the household.
22. The parties produced a significant quantity of mail addressed to them jointly and separately at their Upper Coomera address. I am satisfied that they have shared the address for some six years.
23. The parties gave evidence, independently and consistently, about the way they manage their household affairs. As noted in paragraph 15, Mr Hoyer takes care of the major expenses and Ms Acosta is responsible for the groceries and incidentals. Daniel is not paying rent while he is at university but he shares responsibility for the cooking with Ms Acosta. The three share responsibility for cleaning and Mr Hoyer is responsible for the garden. Daniel Hoyer's evidence was to the same effect. I give this evidence some weight.

24. *Social aspects of the relationship*

25. In assessing the social aspects of the relationship, I have considered whether the parties represent themselves to other people as married to each other, the opinion of friends and acquaintances about the nature of the relationship and the basis on which they plan and undertake social activities.
26. As noted above, the parties commenced a de facto relationship immediately upon the arrival of Ms Acosta in Australia in 2012. Mr Hoyer proposed to Ms Acosta in December 2017, on the occasion of her 50th birthday and they were married some three months later. They produced photographs of the wedding and copies of cards and congratulatory messages to the Tribunal.
27. The parties gave evidence that, socially, they tend to be homebodies. They enjoy going to the cinema occasionally and gave consistent evidence as to the movies they had seen recently. They enjoy entertaining at home: several photographs were produced of family barbecues and similar events for Christmas and birthdays.
28. Evidence was received from Daniel, Raymond and Susan Hoyer as to the extent to which they engage in social activities with the couple. Their evidence was credible and consistent and was also well-documented in photographs. All attended the wedding and said that they see the relationship as genuine and long-term. Statutory declarations to similar effect were received from Brenda Powter, Lee-Anne Dove and Cindy Ambridge. I give weight to all that evidence.

29. *The nature of the parties' commitment to each other*

30. In assessing the nature of the parties' commitment to each other, I have had regard to the duration of the relationship, the length of time they have lived together, the degree of

companionship and emotional support they draw from each other and whether they see the relationship as long-term.

31. The evidence before me was that Ms Acosta and Mr Hoyer have lived together as a couple since 2012. They have travelled to the Philippines together on 3 occasions. Ms Acosta has travelled alone to the Philippines for one short trip in 2015 and one longer trip in 2016 to visit her family. Mr Hoyer has made one short trip alone to the Philippines in 2016, which I heard was to do electrical work on Ms Acosta's mother's house. Photographs were produced of the couple socialising with Ms Acosta's family in the Philippines.
32. The evidence from the couple and their family and friends was consistent that they are a happy and loving couple, and that each provides support to each other's family members. Before me, they were clearly comfortable with each other and displayed a detailed knowledge of each other's life and personality. I give this evidence some weight.
33. On the basis of all the material and submissions presented to the Tribunal I am satisfied, for the purposes of s.5F(2)(b)-(d), that the couple have a mutual commitment to a shared life to the exclusion of others, that the relationship is genuine and continuing and that they are living together on a permanent basis.
34. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant meets cl.801.221(2)(c).
35. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

36. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.221 of Schedule 2 to the Regulations
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James Lambie
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).